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18 **IN THE UNITED STATES DISTRICT COURT**
19 **DISTRICT OF ARIZONA**

20 ADDINGTON et. al.,)
21 *Plaintiffs,*)
22 v.)
23 US AIRLINE PILOTS ASS'N, et. al,)
24 *Defendants.*)

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Case No.: 2:13-CV-00471-PGR

**US AIRLINE PILOTS
ASSOCIATION'S RESPONSE TO
PLAINTIFFS' MOTION TO
TRANSFER CASE TO JUDGE
WAKE OR JUDGE SILVER**

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PRELIMINARY STATEMENT

Defendant US Airline Pilots Association (“USAPA”) submits this memorandum of law in response to plaintiffs’ motion to transfer this case to either Judge Wake or Chief Judge Silver. For the reasons set forth herein, USAPA submits this case should be transferred to Chief Judge Silver.

PROCEDURAL POSTURE

This case arises out of a pilot seniority integration dispute that has been the subject of multiple lawsuits within this jurisdiction as far back as 2008. The dispute arose as the result of the 2005 merger of US Airways and America West Airlines into a single carrier operating under the name of US Airways. As of the date of that merger, the pilot groups of both airlines were represented by the same union, the Air Line Pilots Association (“ALPA”). Pursuant to internal ALPA procedures, the two pilot groups attempted to integrate seniority, culminating in an internal arbitration proceeding that resulted in what is known as “the Nicolau Award.” Largely as a result of dissatisfaction and opposition to the Nicolau Award, the consolidated pilot class voted to replace ALPA with USAPA. As the new bargaining representative, USAPA took the position that it was not bound by the Nicolau Award in its negotiations with US Airways.

On September 4, 2008, former America West Airline pilots Don Addington, John Bostic, Mark Burman, Afshin Iranpour, Roger Velez, and Steve Wargocki, all named plaintiffs in this action, commenced a hybrid duty of fair representation (“DFR”) lawsuit against USAPA and US Airways, alleging, *inter alia*, that USAPA’s failure to follow the Nicolau Award violated its duty of fair representation, and that US Airways breached its contract by failing to negotiate in good faith toward implementation of the Nicolau Award.¹

¹ *Addington v. US Airline Pilots Ass’n*, Docket No. 08-CIV-1633 (NVW) (referred hereinafter as “*Addington I*”).

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2 The case was assigned to Judge Wake, who granted US Airways' motion to
3 dismiss. After jury trial and verdict, the District Court issued judgment and injunction
4 directing USAPA to follow the Nicolau Award. On appeal, the Ninth Circuit held that
5 the DFR claim was not ripe and remanded the case to the District Court with directions to
6 vacate its judgment and dismiss the action. *Addington v. US Airline Pilots Ass'n*, 606
7 F.3d 1174 (9th Cir. 2010).

8 The *Addington I* plaintiffs' petition for *en banc* rehearing was denied, as was their
9 motion to stay the mandate pending filing of a petition for *writ of certiorari* to the United
10 States Supreme Court. Their petition for *writ of certiorari* was thereafter denied.

11 On July 26, 2010, shortly after the Ninth Circuit denied rehearing on *Addington I*,
12 defendant US Airways commenced a declaratory judgment action in this district against
13 USAPA and the *Addington I* plaintiffs. In that action, US Airways sought a declaratory
14 judgment on one of three alternative counts: Count I, USAPA and US Airways were
15 bound to follow the Nicolau Award; Count II, USAPA and US Airways were not bound
16 to follow the Nicolau Award; or Count III, US Airways was not liable on any DFR claim
17 without regard to what seniority system it might negotiate with USAPA. (*See Complaint*
18 *in US Airways v. Addington, et al.*, Docket No. 10-CIV-1570(ROS), Doc. 1, at 22). The
19 *Addington* defendants filed a cross-claim against USAPA for breach of the duty of fair
20 representation. (*See Addington Pilots Answer and Cross-Claim in US Airways v.*
21 *Addington, et al.*, Docket No. 10-CIV-1570(ROS), Doc. 34, at 7-30). The case was
22 assigned to Chief Judge Silver.

23
24 The *Addington* defendants moved to transfer the action to Judge Wake on the
25 ground that, *inter alia*, it was related to *Addington I* in that the two cases involved the
26 same parties and facts, and that there would be "substantial duplication of effort" if the
27 action was not transferred to Judge Wake. (*See Docket No. 10-CIV-1570(ROS), Doc. 3,*
28 *at 5*) Judge Wake declined to take the case and denied the motion to transfer on grounds

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2 that would apply equally to the present action. Judge Wake held the “substantive rulings
3 in *Addington* have been vacated pursuant to mandate, and both cases would now write on
4 clean slates if there were anything to write in *Addington*, which there is not.” *Addington*
5 *v. US Airline Pilots Ass’n*, 2010 WL 4117216, at *2 (D. Ariz. Oct. 19, 2010).

6 US Airways’ declaratory judgment action remained with Chief Judge Silver, and
7 on June 1, 2011, she issued an order granting USAPA’s motion to dismiss the *Addington*
8 defendants’ cross-claim on the ground that their DFR claim was not ripe. (See Order in
9 *US Airways v. Addington, et al.*, Docket No. 10-CIV-1570(ROS), Doc. 85).

10 In October, 2012, on cross-motions for summary judgment, Chief Judge Silver
11 issued an order and judgment dismissing Counts I and III, and issued judgment in favor
12 of USAPA on Count II holding that “there is no obvious impediment to USAPA and US
13 Airways negotiating and agreeing upon any seniority regime they wish.” *US Airways,*
14 *Inc. v. Addington*, 2012 WL 5996936, at * 4 (D. Ariz. Oct. 11, 2012).² US Airways’
15 motion for relief from the judgment was denied, and their appeal, filed on January 2,
16 2013, is currently pending before the Ninth Circuit.³

17
18 There has been a substantial change in circumstances since *Addington I* was tried
19 before Judge Wake, including that on February 14, 2013, US Airways and American
20 Airlines announced that the companies had reached a merger agreement to form what is
21 referred to as “New American.” The merger agreement provides, *inter alia*, that, subject
22 to and effective upon the confirmation and consummation of a chapter 11 plan of
23 reorganization, US Airways will become a wholly-owned subsidiary of AMR
24

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26 ² USAPA rejects Plaintiffs’ reading of Chief Judge Silver’s opinion where they
27 allege Chief Judge Silver “stopped just short” of ruling that USAPA breached its duty of
28 fair representation because it had no legitimate union purpose to reject the Nicolau
Award. (Plaintiffs’ Mem. of Law, p. 3)

³ Ninth Circuit Docket No. 13-15000.

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2 Corporation, the parent company of American Airlines. The merger agreement must first
3 be reviewed by the Antitrust Division of the Department of Justice and submitted to and
4 approved by the Bankruptcy Court for the Southern District of New York which has
5 jurisdiction of the pending American Airlines bankruptcy, and thus it is anticipated that
6 the Plan of Reorganization, if approved, will become effective in September, 2013.

7 Because the pilot groups of US Airways and American Airlines are not
8 represented by the same collective bargaining representative, the McCaskill-Bond
9 Amendment to the Federal Aviation Act, 49 U.S.C. §42112, which governs seniority
10 integration in the event of a merger between air carriers, applies to the US Airways,
11 American Airlines merger. 45 U.S.C. § 151 et seq.

12 USAPA, the Allied Pilots Association (which represents the pilots of American
13 Airlines), US Airways, and American Airlines are parties to a Memorandum of
14 Understanding (MOU) that sets the terms and conditions of employment for the
15 consolidated pilot group (US Airways and American) in the event the merger goes
16 forward. The MOU, which was ratified by an overwhelming majority of the former
17 America West Airline pilots, provides that seniority will be integrated through the
18 McCaskill-Bond process and establishes an aggressive timetable for its completion. (*See*
19 *Exhibit 1 to the Declaration of Andrew S. Jacob in Support of West Pilots' Motion to*
20 *Transfer*)

21 On or about February 19, 2013, counsel for plaintiffs in the instant case sent letters
22 to US Airways, the Allied Pilots Association (which represents the pilots employed by
23 American Airlines) and USAPA threatening
24

25 that unless USAPA agrees that the Nicolau list will be integrated with the
26 American list, the West Pilots will be forced to file a third round of
27 litigation and seek an injunction of the merger process until we can get a
28 court order directing that the only list that can be used is the Nicolau.

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2 On or about February 20, 2013, counsel sent USAPA a letter demanding a litigation hold
3 on certain materials, in anticipation of litigation.

4 In response to these threats, USAPA filed an adversary proceeding in the
5 Bankruptcy Court for the Southern District of New York alleging that the threats violated
6 the automatic stay provisions of the Bankruptcy Code *In re AMR Corp.*, Case No. 11-
7 15463. The adversary proceeding sought to enjoin counsel's apparent client, Leonidas,
8 LLC, from interfering with the Bankruptcy Proceeding or the merger between US
9 Airways and American Airlines, approval of which was then pending before the
10 Bankruptcy Court.

11 USAPA filed an amended complaint on March 28, 2013, adding the individual
12 plaintiffs in this action as defendants. At an April 3, 2013 status conference on the
13 adversary proceeding, the defendants represented that they have no intention of
14 interfering with the merger. With that assurance on the record, USAPA agreed to
15 withdraw the adversary proceeding and to withdraw the Motion to Transfer this case to
16 the United States District Court for the Southern District of New York which had been
17 filed earlier this week.

18
19 **ARGUMENT**
20 **THIS CASE SHOULD BE REASSIGNED TO CHIEF JUDGE SILVER**

21 As discussed above, Chief Judge Silver just recently presided over US Airways'
22 declaratory judgment action against USAPA and the plaintiffs in this action. The
23 declaratory judgment action and this action arise from substantially the same events,
24 involve the same parties⁴, and involve determinations of the same questions of law,
25 including the dispute between USAPA and the plaintiffs over seniority integration,
26

27 ⁴ The only difference in the parties is that there are three additional individual
28 pilots named as plaintiffs in this action in addition to plaintiffs Addington, Bostic,
Burman, Iranpour, Velez, and Wargocki, who were all named defendants in the
declaratory judgment action.

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2 whether the DFR claim is ripe, and, if so, whether USAPA’s duty of fair representation
3 requires it to implement the Nicolau Award, and whether US Airways can accept or
4 implement a non-Nicolau seniority list. *See* Local Civil Rule 42.1(a)(1). Considerations
5 of judicial economy favor assignment to Chief Judge Silver in view of her more recent
6 involvement with these issues and familiarity with the facts of this case.

7 This case should not be transferred to Judge Wake. Indeed, given that the reasons
8 plaintiffs advance for the transfer to Judge Wake now are identical to those rejected by
9 Judge Wake when these same parties⁵ attempted to transfer the declaratory judgment
10 action that was assigned to Judge Silver, there is every reason to believe he would decline
11 to transfer this action for the same reason: “both cases would now write on clean slates if
12 there were anything to write in *Addington*, which there is not.” *Addington v. US Airline*
13 *Pilots Ass’n*, 2010 WL 4117216, at *2 (D. Ariz. Oct. 19, 2010).⁶

14
15 Further, it has been four-and-a-half years since Judge Wake presided over
16 *Addington I*, and the factual landscape surrounding seniority integration has changed
17 substantially. *See Air Line Pilots Ass’n, Intern. v. O’Neill*, 499 U.S. 65, 67, 111 S.Ct.
18 1127, 1130 (1991) (“a union’s actions are arbitrary only if, in light of the factual and legal

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20 _____
21 ⁵ USAPA considers these parties identical notwithstanding three additional named
22 class representatives as noted in footnote 4 above.

23 ⁶ The Ninth Circuit’s reversal “effectively annuls or sets aside the lower court’s
24 decision for *all purposes*. Consequently, any issue implicated by the reversal must be
25 readjudicated as if the appealed judgment or order never occurred.” C. Goelz & M.
26 Watts, *Rutter’s California Practice Guide: Federal Ninth Circuit Civil Appellate*
27 *Practice* § 10:231 (emphasis in original), citing *State of Calif. Dept. of Social Services v.*
28 *Thompson*, 321 F3d 835, 847 (9th Cir. 2003). *See also id.* § 10:260 (“with reversal on
appeal, the Ninth Circuit’s vacatur of a district court judgment nullifies and renders the
judgment inoperative”), citing *United States v. Munsingwear*, 340 US 36, 40-41 (1950)
(vacatur prevents judgment from “spawning any legal consequences”); *Orff v. United*
States, 358 F3d 1137, 1149 (9th Cir. 2004) (district court’s rulings on merits of certain
claims issued without subject matter jurisdiction vacated as nullities).

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2 landscape at the time of the union's actions, the union's behavior is so far outside a 'wide
3 range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681,
4 686 (1953) , as to be irrational.”).

5 Aside from the fact that the case before Judge Wake was dismissed for lack of
6 jurisdiction, given the numerous changes in factual circumstances since that time, the
7 proceedings before Judge Wake in *Addington I* are no longer relevant. Not only is the
8 economic landscape today significantly different than it was during *Addington I*, no
9 merger between US Airways and American Airlines was contemplated. Further, while
10 USAPA continues to believe Plaintiffs’ latest claims are not ripe because there is still no
11 collective bargaining agreement integrating pilot seniority, even assuming they were,
12 such claims must be evaluated in light of the current factual landscape confronting the
13 parties. *See O’Neill*, 499 U.S. at 78, 111 S.Ct. 1127, 1136 (“The approach of the Court of
14 Appeals is particularly flawed because it fails to take into account . . . the importance of
15 evaluating the rationality of a union's decision in light of both the facts and the legal
16 climate that confronted the negotiators at the time the decision was made.”). Chief Judge
17 Silver has the most familiarity with the issues and current facts involved in this case.

18
19 **CONCLUSION**

20 For the foregoing reasons, USAPA requests that this case be transferred to Chief
21 Judge Silver, and plaintiffs’ motion to transfer to Judge Wake be denied.

22
23 Respectfully submitted this 5th day of April, 2013.

24
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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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